ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: WASHINGTON

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Table of Contents

Definitions and Concepts

"Indeterminacy" means "unpredictability of time served." Once we know the terms of a particular judicial sentence, can we say with confidence how much time the defendant will actually serve before the sentence's expiration? If actual time-that-will-be-served is highly unpredictable based on the pronounced judicial sentence, then the sentence is highly indeterminate. If actual time-to-be-served is knowable within a relatively small range of possibility, then the sentence has a low degree of indeterminacy—or, we might say—it has a high degree of determinacy. "Determinacy" means "predictability of time served" at the time of judicial sentencing.

Scaling up to the systemwide level, the project explores the degree to which prison population size in each state is placed under the jurisdiction of decision makers who exercise time-served discretion after judicial sentences have been finalized. Higher degrees of indeterminacy across individual sentences add up to greater control over prison population size by "back-end" agencies such as parole boards and departments of correction. These structural features vary greatly across U.S. jurisdictions. One goal is to inform state governments how they may deliberately adjust their laws and practices of prison-release authority to achieve desired policy goals, such as reductions of prison populations in a manner consistent with public safety

Note on the project's rankings of "degrees of indeterminacy"

To compare the degrees of indeterminacy in individual prison sentences or across the prison-sentencing systems of different jurisdictions, we use a qualitative ranking framework based on our cumulative learning while preparing the project's 52 jurisdiction-specific reports. To avoid false precision, we place all systems within one of five categories (see table below).

Each of the five categories can be expressed in alternative terms: either the *degree of indeterminacy* or *degree of determinacy* thought to be present. Our five tiers are based on the variations we observe in current American sentencing systems, not any absolute or theoretical conceptions of degrees of indeterminacy that could be imagined in hypothetical systems.

The ranking scale is subjective, although the reasoning that supports our judgments is laid out in each report. Ultimately, the rankings indicate only the rough position of specific prison-sentencing systems vis-à-vis each other. No two American prison-release systems are alike and all are highly complex, so nuanced comparative analysis requires closer inspection.

Rankings of "Degrees of Indeterminacy"

Ranking	**Alternative terminology**	
1	Extremely-high indeterminacy	Extremely-low determinacy
2	High indeterminacy	Low determinacy
3	Moderate indeterminacy	Moderate determinacy
4	Low indeterminacy	High determinacy
5	Extremely-low indeterminacy	Extremely-high determinacy

Prison-Release Discretion and Prison Population Size

State Report: Washington[1]

Executive Summary

Overall, Washington's prison-sentencing system operates with a low degree of indeterminacy. Put another way, it is a highly determinate system. Parole-release discretion for most prisoners was abolished in 1984 and earned time allowances were cut back in 2010. Most prisoners serve sentences that can be reduced only by earned time credits, with a top reduction of 33 percent from their judicial maximum terms. A minority of prisoners serve sentences that are extremely determinate (subject to only 10-percent reductions or less). Another small group serves indeterminate sentences.

With the exception of the small group of parole-eligible prisoners, the only back-end authority with meaningful time-served discretion in ordinary cases is the department of corrections, through the credit system administered largely by prisons officials.

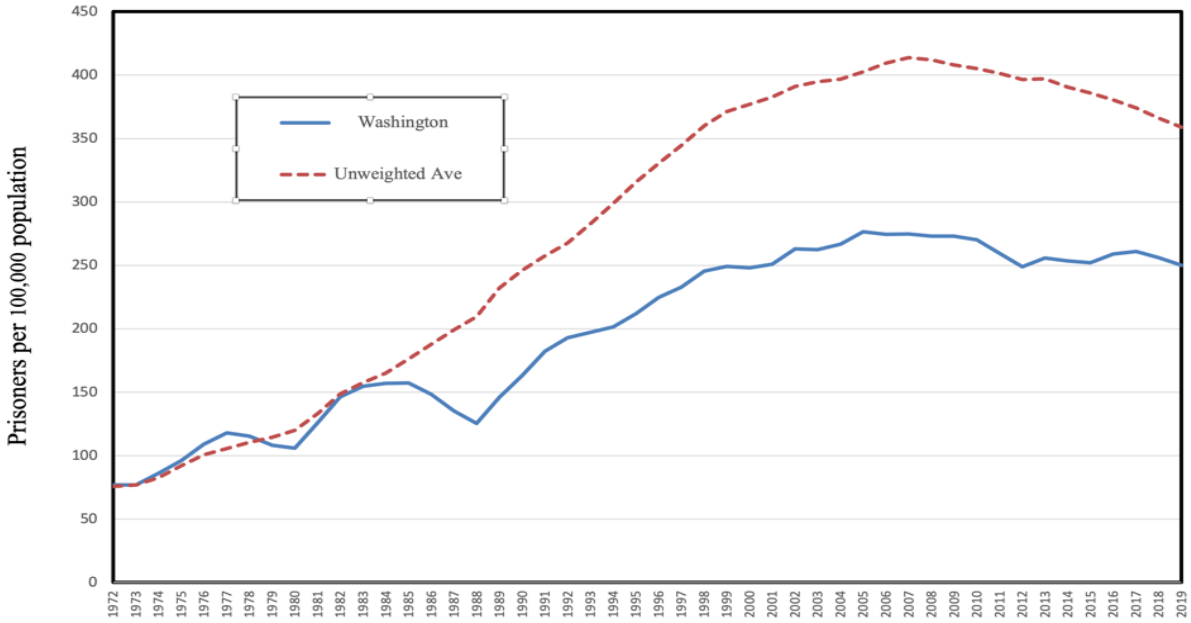
[1] This report was prepared with support from Arnold Ventures. The views expressed are the authors' and do not necessarily reflect the views of Arnold Ventures. We thank Katherine Beckett and Jeffrey Ellis for their comments on earlier drafts of this report.

Introduction

Washington's prison-rate history, 1972 to 2019

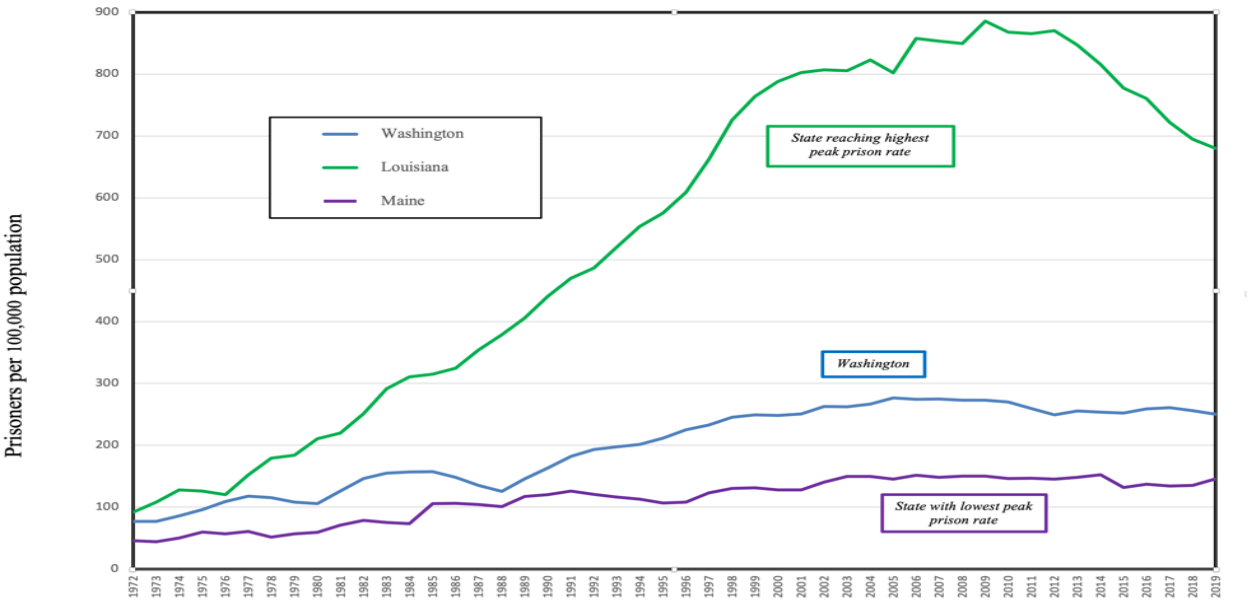
At year end 2019, Washington's prison rate was 250 per 100,000 general population, with a prison population of 19,184.[2] Washington's prison rate was 37th highest among all states.

Figure 1. Prison Rate Change in Washington and (Unweighted) Average Among All States, 1972 to 2019



[2] E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020) at 8 table 4, 12 table 7.

Figure 2. Prison Rate Change in Washington, Louisiana, and Maine, 1972 to 2019



Sources: Timothy J Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990* at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann Carson, Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016 (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), *available at* https://www.bjs.gov/index.cfm?ty=nps (visited May 24, 2020); E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020) at 11 table 7 (for 2017); E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020) at 11 table 7 (for 2018-2019).

Washington reached its peak prison rate during the national buildup period in 2005 at 277 per 100,000, which dropped to 250 per 100,000 in 2019. This is a net difference of -27 per 100,000, which was the 37th largest prison-rate drop of all states.

Washington's prison-rate history from 1972 through 2019 saw a one-time shift in the "personality" of the state's practices. At the outset of the Great Prison Buildup period (1972 through 2007), Washington's prison rate was slightly above average among all 50 states, and the state maintained its "about-average" status through the early 1980s. After enactment of the state's sentencing guidelines and abolition of parole-release discretion in 1984, however,

Washington dropped in the comparative state rankings. By 1989, it had fallen to 40th position and has remained in roughly the same position ever since.[3]

Organization of this report

This report is divided into four parts. Parts I through III describe the contours of Washington's prison-release system in some detail, with extensive citations and statutory analysis. Part I surveys the prison-release rules that apply to most prisoners. Part II then covers a number of important subgroups of prisoners who are not subject to the general rules. Part III catalogues some additional prison-release mechanisms that exist in Washington but are infrequently used, such as medical release and the clemency power.

Part IV draws on the raw research in Parts I through III to analyze and model the degrees of indeterminacy that exist for the most important subgroups of prisoners who are serving different classes of sentences. Ultimately, if a large enough percentage of all prisoners are included, this allows for broad observations about the Washington system as a whole. The overarching goal of Part IV is to explore the relationship between the various forms of prison-release discretion in Washington and the size of the state's prison population.

Terminology note

This report will generally refer to the Washington State Department of Corrections as the "department of corrections." It will generally refer to the Washington Institutional Sentencing Review Board as the "parole board."

[3] *See* sources cited for Figures 1 and 2. Washington's prison rate in 1972 was 22nd highest among all states. For an overview of Washington's prison-rate history from the 1980s into the 2010s, *see* Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* (ACLU of Washington, 2020) (attributing most of Washington's prison growth from the 1990s forward to the state's three-strikes law, statutory firearms sentencing enhancements, increases in how criminal history was scored under the sentencing guidelines, increased automatic transfers of juveniles to adult courts, and reductions in available earned time credits). For a detailed history of the development of the state's sentencing guidelines and their intended effects, *see* David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 Crime and Just. 71-136 (2001).

I. General Rules of Prison-Release Discretion

In sentencing-system reforms effective in 1984, Washington abolished parole-release discretion for most offenses and instituted judicial sentencing guidelines.[4]

Judicial sentences in Washington express the judicial maximum term with no accompanying minimum term. In prison cases, judges must impose sentences within the range of durations recommended by the sentencing guidelines unless they find "substantial and compelling" reasons that justify a departure from the guidelines.[5] In aggravated departure cases, judges may select a judicial maximum term up to the statutory maximum prison term, but are free to impose a shorter term.[6]

Judicial maximum sentences do not place an absolute ceiling on a prisoner's time-served exposure in Washington. The judicial *prison* sentence is separable from any sentence of postrelease supervision a prisoner is required to serve. The length of the free-standing supervision term is determined by the conviction offense and is not calculated with reference to the unserved balance of the maximum term on the prisoner's date of release.[7] During such "add-on" supervision periods, released prisoners are vulnerable to additional increments of confinement that could be imposed as sanctions for sentence violations.[8]

A. Determination of release eligibility

1.1. General rules of prison release

Most people given prison sentences in Washington must serve their full judicial maximum terms reduced only by earned release time.[9] Formulas vary, but no prisoners may earn more than a one-third reduction of their maximum term under current law, many are limited to a

[4] *See* David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washin*gton, in Michael Tonry ed., 28 Crime and Justice: A Review of Research 71-136 (2001).

[5] Wash. Rev. Code § 9.94A.535.

[6] Washington State Caseload Forecast Council, *2019 Washington State Adult Sentencing Guidelines Manual* (2019) at 68 ("An exceptional sentence must be for a determinate term and cannot exceed the statutory maximum for the crime.").

[7] *See* Wash. Rev. Code § 9.94A.701.

[8] *See* Wash. Rev. Code § 9.94A.633(1)(a) ("An offender who violates any condition or requirement of a sentence may be sanctioned by the court with up to sixty days' confinement for each violation or by the department with up to thirty days' confinement").

[9] Wash. Rev. Code § 9.94A.728(1)(a).

10-percent reduction, and some are disqualified from earning credits during some or all of their confinement terms.[10]

1.2. Prisoners eligible for discretionary release

Washington maintains a parole board called the Institutional Sentencing Review Board with jurisdiction limited to four categories of cases: (1) Prisoners still incarcerated for crimes committed before July 1, 1984;[11] (2) prisoners sentenced to life without parole for offenses they committed while under age 18 (see section 2.3); (3) prisoners sentenced to extremely long prison terms (in excess of 20 years) for offenses they committed while under age 18 (see section 2.4); and (4) sex offenders sentenced to indeterminate sentences under Washington's "Determinate Sentencing Plus" law (see section 2.5).[12]

1.3. Reconsideration after denials of parole release

For prisoners with parolable sentences, Washington law generally contemplates a turnaround period of as much as five years between any denial of release by the parole board and the prisoner's next consideration. The board has discretion to offer a shorter period, however.[13]

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[10] *See* Wash. Rev. Code § 9.94A.729. For a more complete discussion of Washington's earned-release-time system, *see* section 1.4.

[11] Wash. Rev. Code § 9.95.017(1).

[12] See Katherine Beckett & Heather D. Evans, About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State (ACLU of Washington, 2020) at 91:

> During the 2001 Second Special Session, the Legislature enacted 3ESSB 6151 – The Management of Sex Offenders in the Civil Commitment and Criminal Justice Systems. The resulting "non-persistent sex offender" system is also called "determinate-plus," but it is actually an indeterminate sentence.

[13] The applicable rules are stated somewhat differently for the three main classes of prisoners. For juvenile lifers who are denied release, the board must set a new minimum term of not more than five additional years. Wash. Rev. Code § 10.95.030(3)(f). For prisoners with extremely long sentences for crimes committed while juveniles, the timing of reconsideration is similar. The five-year ceiling is less mandatory, however: Such prisoners "may petition" for reconsideration for release after five years, while the board has discretion to set an earlier date. Wash. Rev. Code § 9.94A.730(6). For sex offenders with indeterminate sentences under the Determinate Sentencing Plus law: When release is denied, the board must set a new minimum term of not more than five years from the date of denial. Wash. Rev. Code § 9.95.011(2)(b). In setting a new minimum term, the board "may consider the length of time necessary for the offender to complete treatment and programming as well as other factors that relate to the offender's release." *Id.*, § 9.95.011(2)(c). Prisoners may petition for earlier reconsideration on grounds of new information or changed circumstances. Wash. Rev. Code § 9.95.011(2)(c).

B. General rules on the effects of good time, earned time, and other discounts

1.4. Generally-available credits: types and amounts

Washington law allows most prisoners to reduce their judicial maximum terms through the accrual of "earned release credits" for "for good behavior and good performance." There are no statutory criteria for the earning of credits, and no routinized time schedule for their accrual. Instead, the applicable statute provides that credits are to be awarded "in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined."[14]

There are statutory ceilings on the total amount of earned time credits different classes of prisoners may earn. Since 2010, most prisoners have been eligible to earn reductions of up to one-third of their judicial maximum sentences—the highest current earning rate.[15] For some prisoners convicted of nonviolent offenses committed before July 1, 2010, reductions of up to 50 percent are allowed. The higher earning rate, enacted in 2003, was subject to a sunset provision and was allowed to lapse in 2010 when the legislature failed to extend the law.[16]

Lower ceilings or rules of outright ineligibility are as follows:

- Earned time reductions are limited to 10 percent of judicial maximum terms for prisoners convicted of a "serious violent offense" or class-A-felony sex offense.[17] "Serious violent offenses" are defined by Washington law to include murder in the first degree; homicide by abuse; murder in the second degree; manslaughter in the first degree; assault in the first degree; kidnapping in the first degree; rape in the first degree; assault of a child in the first degree; and an attempt, criminal solicitation, or criminal conspiracy to commit one of the above felonies.[18]

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[14] Wash. Rev. Code § 9.94A.729(1)(a). For current policies, *see* Wash. Dep't of Corr. Pol. No. DOC 350.100 ("Earned Release Time") (revised Sept. 21, 2015), *available at* http://www.doc.wa.gov/information/policies/files/350100.pdf.

[15] Wash. Rev. Code § 9.94A.729(3)(e).

[16] Wash. Rev. Code §§ 9.94A.729(3)(d),(4). For an account of Washington's shifting approach to earned time credits since the 1980s, *see* Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* (ACLU of Washington, 2020) at 21-23. *See also* Elizabeth K. Drake, Robert Barnoski & Steve Aos, *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs*, Revised (Washington State Institute for Public Policy, 2009).

[17] Wash. Rev. Code § 9.94A.729(3)(c). This earning rate applies to prisoners who committed their offenses after July 1, 2003. For offenses prior to that date, the earning rate for this group was 15 percent. *Id.*, § 9.94A.729(3)(b).

[18] Wash. Rev. Code § 9.94A.030(46).

- Prisoners serving parolable life sentences for aggravated murders committed as juveniles may not receive earned release credits against their minimum terms.[19]

- Washington law restricts eligibility for earned time credits for prisoners convicted of designated felonies who have received "deadly weapon enhancements" lengthening their judicial maximum sentences. The enhancements are mandatory and must be imposed consecutively to any other sentence imposed.[20] No credits accrue during the portion of the sentence attributable to the deadly weapon enhancement, which vary in length from 18 months to ten years.[21]

a. Effects of good time credits on release eligibility

For prisoners serving indeterminate sentences, earned release credits have no effect on their dates of first parole-release eligibility.

b. Effects of good time credits on the judicial maximum term

Earned release credits are subtracted from judicial maximum sentences to result in earlier mandatory release dates.

1.5. Loss of good time credits

Earned release credits may be forfeited for "serious violations." Previously earned credits may be forfeited as well as future credits. In most cases, credits lost can later be restored pursuant to "restoration plans" established by prison counselors for individual prisoners.[22]

[19] Wash. Rev. Code § 9.94A.729(3)(a).

[20] The deadly weapon enhancements are found in Wash. Rev. Code § 9.94A.533 (3) and (4). *See* Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* (ACLU of Washington, 2020) at 19-20 (discussion of the "Hard Time for Armed Crime Act," spurred by a voter initiative in 1995).

[21] Wash. Rev. Code § 9.94A.729(2).

[22] Wash. Dep't of Corr. Policy No. DOC 350.100 ("Earned Release Time") (revised Sept. 21, 2015), *available at* http://www.doc.wa.gov/information/policies/files/350100.pdf.

II. Prisoners Outside the General Rules

2.1. Life sentences without parole

A life sentence without the possibility of release (LWOP) is the mandatory penalty for: defendants convicted of aggravated murder who do not receive the death penalty;[23] and defendants convicted as "persistent offenders" under Washington's three-strikes law.[24]

As of September 30, 2020, 4.1 percent of all prisoners in Washington were serving LWOP sentences (or about 607 of 14,817).[25]

2.2. Life sentences with possibility of parole

Under present law, life sentences with possibility of parole are imposed primarily for sex offenses under the "Determinate Sentencing Plus" statutory scheme (see section 2.5), or are parolable juvenile life sentences (see section 2.3).

As of September 30, 2020, 14.7 percent of all prisoners in Washington were serving life sentences with the possibility of release (or about 2,178 of 14,817).[26]

2.3. Juvenile life sentences

Washington abolished LWOP sentences for offenders who were under age 16 at the time of their offenses, but retained the penalty for those aged 16 to 18. Upon conviction of aggravated murder, a defendant in the younger group must receive a sentence of 25 years to life. A defendant in the older group may be sentenced to LWOP if the sentencing procedures required

[23] Wash. Rev. Code § 10.95.030(1).

[24] Wash. Rev. Code §§ 9.94A.030(37), 9.94A.570. The three-strikes law applies to defendants upon a third conviction of a "most serious offense" as catalogued in § 9.94A.030(32). "Persistent offenders" also include defendants with a current conviction of a "most serious offense" with at least one prior conviction for a serious sex offense or sexually-motivated offense. *Id.* § 9.94A.030(37)(b). For a history of the enactment and revisions of the three-strikes law and its "two-strikes" offshoots, *see* Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* (ACLU of Washington, 2020) at 16-17.

[25] Washington State Department of Corrections, *Fact Card* (Sept. 30, 2020), *available at* https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf.

[26] *Id.*

by the Supreme Court in *Miller v. Alabama* are followed.[27] If not sentenced to LWOP, a defendant in the older group must receive a sentence of 25 years to life.[28]

2.4. Juveniles with extremely long sentences

Prisoners sentenced for one or more crimes committed before age 18 may petition the parole board for release after serving at least 20 years of confinement.[29] This rule does not apply to prisoners convicted of aggravated murder or sex offenders subject to the "Determinate Sentencing Plus" law (see section 2.5).

2.5. Sex offenders sentenced under the "Determinate Sentencing Plus" law

Defendants convicted of designated sex offenses or sexually-motivated offenses receive indeterminate sentences under Washington's "Determinate Sentencing Plus" law.[30] Maximum sentences must be set at the full statutory maximum for the offense of conviction and minimum terms are usually set with reference to the state's judicial sentencing guidelines. In some circumstances, minimum terms of at least 25 years are statutorily required. A number of predicate offenses carry statutory maximum terms of life in prison, which creates an important category of mandatory but parolable life sentences in Washington law.[31]

Offenders subject to the law include:

- Defendants convicted of rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

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[27] *See Miller v. Alabama*, 567 U.S. 460, 480 (2012) (holding mandatory sentences of life without parole unconstitutional when applied to defendants who were under age 18 at the time of their crimes; stating further that, "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). *See also Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016) (stating that *Miller* required "a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.").

[28] Wash. Rev. Code § 10.95.030(3). The statute expressly references the *Miller* decision. *See id.*, § 10.95.030(3)(b) ("In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.").

[29] Wash. Rev. Code § 9.94A.730.

[30] Wash. Rev. Code § 9.94A.507.

[31] All class A felonies under Washington law carry a maximum life sentence. *See* Wash. Rev. Code § 9A.20.021(1)(a) (2019).

- Defendants convicted of one of the following offenses with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

- Defendants convicted of an attempt to commit any crime listed above; or

- Defendants with a prior conviction of a "most serious offense" and with a current conviction of any sex offense other than failure to register.[32]

[32] Wash. Rev. Code § 9.94A.507(1). For the list of crimes that qualify as "most serious offenses" and under Washington law, *see* Wash. Rev. Code § 9.94A.030(32). The operation of the prior conviction provision is in doubt because the statutory drafters cross-referenced the wrong subsection of § 9.94A.030. *See* Wash. Rev. Code § 9.94A.507, Official Notes.

III. Other Forms of Prison-Release Discretion (not routinely used)

3.1. Medical or "compassionate" release

Washington's version of medical release is called "extraordinary medical placement" (EMP) administered by the department of corrections. The secretary of corrections may authorize release when the prisoner has a serious medical condition that is "expected to require costly care or treatment," so long as the prisoner is "physically incapacitated" and release "will result in a cost savings to the state."[33] Prisoners are not eligible for EMP if they have been sentenced to death or LWOP, of have been sentenced as "persistent offenders."[34]

EMP is not an important determinant of prison population size in Washington. Only two prisoners were granted EMP in 2018, and a total of only five prisoners were on EMP status at any time during that year.[35]

3.2. Extraordinary release

The governor has authority to "grant an extraordinary release for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances," but this power depends on a recommendation from the clemency and pardons board.[36]

Extraordinary release is not an important determinant of prison population size in Washington. We have found no record of a grant of extraordinary release by the governor.[37]

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[33] Wash. Rev. Code § 9.94A.728(1)(c)(i).

[34] Wash. Rev. Code §§ 9.94A.728(1)(c)(ii),(v).

[35] Washington State Department of Corrections, *Extraordinary Medical Placement (EMP) CY 2018*, *available at* https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=EMP%20Report%20CY2018_1426077e-20d2-4654-96e1-ef73f078261c.pdf.

[36] Wash. Rev. Code § 9.94A.728(1)(d). The clemency and pardons board has five members appointed by the governor. *Id.*, § 9.94A.880. Its jurisdiction extends to "extraordinary cases," and it has responsibility to "make recommendations thereon to the governor." *Id.* § 9.94A.885(1).

[37] Governor Inslee Clemency and Pardons Board, *Hearing Outcomes Status Table* (records from Dec. 7, 2012 to Sept. 11, 2020), *available at* https://www.governor.wa.gov/sites/default/files/Status%20Table%20for%20CPB%20website.pdf, visited Dec. 11, 2020.

3.3. Executive clemency

Under the Washington Constitution, "[t]he pardoning power shall be vested in the governor under such regulations and restrictions as may be prescribed by law."[38] By statute, the governor may pardon any prisoner or commute any sentence.[39]

The clemency power is not an important determinant of prison population size in Washington. A recent study reported that, from 2013 to 2017, the governor granted clemency to fewer than five prisoners per year.[40]

3.4. Emergency release for prison overcrowding

If the governor "finds that an emergency exists in that the population of a state residential correctional facility exceeds its reasonable, maximum capacity," the governor may do one or both of the following:

- Call the sentencing guidelines commission into "an emergency meeting for the purpose of evaluating the standard ranges and other standards." Subject to the legislature's approval or failure to act, the commission "may adopt any revision or amendment to the standard ranges or other standards that it believes appropriate to deal with the emergency situation."[41]

- Call the clemency and pardons board into "an emergency meeting for the purpose of recommending whether the governor's commutation or pardon power should be exercised to meet the present emergency."[42]

3.5. COVID releases

In response to the COVID crisis, Washington's governor issued an emergency commutation on April 15, 2020 allowing the release of prisoners convicted only of nonviolent or drug offenses with projected release dates before June 29, 2020. As of May 15, 2020, the department of

[38] Wash. Const., art. 3, § 9.

[39] Wash. Rev. Code §§ 9.94A.728(1)(g); 10.01.120. *See also In re Bush*, 193 P.3d 103, 106 (Wash. 2008) ("It is clear that the governor has ample discretion … to commute a prisoner's sentence.").

[40] Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* (ACLU of Washington, 2020) at 80.

[41] Wash. Rev. Code § 9.94A.870(1).

[42] Wash. Rev. Code § 9.94A.870(2).

corrections reported the release of 422 prisoners through commutations and an additional 528 prisoners through a "Rapid Reentry" process.[43]

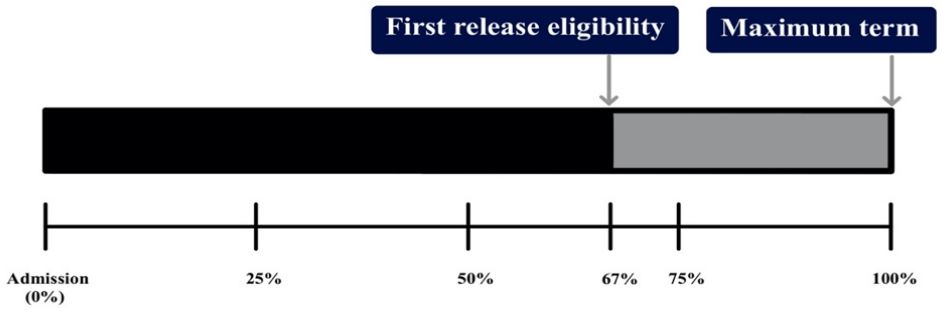
[43] Washington State Department of Corrections, *Coronavirus/COVID-19 Plan: Significant Events Timeline* (updated November 13, 2020), *available at* https://www.doc.wa.gov/news/2020/docs/daily-situation-report.pdf.

IV. Modeling the Relationship Between Prison-Release Discretion and Prison Population Size in Washington

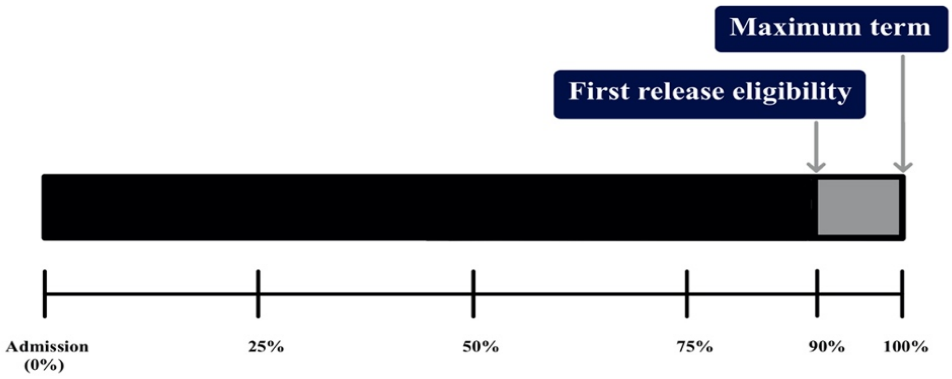
4.1. General-rules cases

Most Washington prisoners serve sentences with no parole-release eligibility. Their maximum terms may be reduced by as much as 33 percent through the accrual of earned time credits. Prisoners convicted of "serious violent offenses" are limited to a reduction of 10 percent, and some prisoners are not eligible to receive credits during some or all of their terms (see section 1.4). Figure 3 depicts the sentences of those subject to the 33-percent rule. Their sentences are 67 percent determinate and 33 percent indeterminate. Figure 4 illustrates sentences for prisoners with a 10-percent ceiling on credit earnings. These sentences are 90 percent determinate.

Washington Figure 3. Prison-Release Timeline for General-Rules Cases with Earned-Time Credits



Washington Figure 4. Prison-Release Timeline for Serious Violent Offenders with Earned-Time Credits



In this project, we use the term "population-multiplier potential" (or PMP) to express the amount of influence on prison-population size that is ceded by law to back-end decision makers such as parole boards and departments of corrections. To give an oversimplified example, if all

prisoners in a hypothetical jurisdiction were eligible for parole release after serving 25 percent of their maximum sentences, then the PMP attached to the parole board's release decisions is 4:1. That is, if the parole board were to deny release to all prisoners for as long as legally possible (a *never-release scenario*), the resulting prison population would be four times as large as it would be if the board were to release all prisoners at their earliest allowable release dates (an *always-release scenario*).[44]

We estimate that the majority of Washington's prisoners are subject to the 33-percent earning rule as shown in Figure 3. For the group of prisoners serving such sentences, the PMP is 1.5:1. That is, the prison population for this cohort would be 50 percent larger if all credits were denied to all prisoners than if all credits were granted. For prisoners limited to a 10-percent reduction of their judicial maximum terms, the PMP is 1.11:1. That is, differential administration of the earned credit system could at most make a difference in prison population size of 11 percent for the relevant cohort of prisoners.

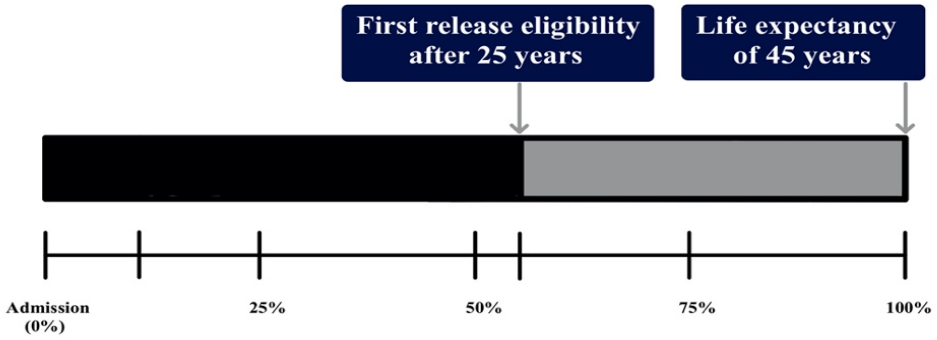
4.2. Parolable life sentences for murder

Parolable life sentences are limited to prisoners convicted of murders committed when they were under age 18 (see section 2.3), and prisoners (adults or juveniles) with indeterminate sentences for serious sex offenses under Washington's "Determinate Sentencing Plus" law, some of which carry maximum terms of life (see section 2.5). For murder cases, first parole eligibility comes after 25 years, not reducible by credits or other discounts. For sex offenders sentenced under the Determinate Sentencing Plus law, minimum terms are set with reference to the judicial sentencing guidelines, but are sometimes set at 25 years.

[44] This highly simplified illustration does not consider the possible effects of good time or other discounts. Moreover, unlike the illustration, there is no real-world system in which all prisoners are serving sentences subject to the same prison-release formula. In every prison population, there are various subpopulations of prisoners who are serving different classes of prison sentences, including some who are serving revocation sentences. Each sentence class must be analyzed separately; there is no single PMP that reaches uniformly across the prison population. It may be possible to calculate a single weighted average PMP for an entire prison system, but this would require fine-grained information about the composition of the prison population and the mix of sentences different groups of prisoners are serving. For a more complete discussion of the calculation and uses of the PMP measure, see this project's Final Report.

Consistent with our other reports, we estimate the degree of indeterminacy in life sentences against an estimated life expectancy of 45 years. See Figure 5. Assuming a 25-year minimum term, such sentences are 56 percent determinate with a PMP of 1.8:1.

Washington Figure 5. Prison-Release Timeline for Life Sentence for Murder (25 years to life)*



* In Washington, this sentence is only available for prisoners who committed their offenses as juveniles

4.3. Distribution of time-served discretion

For the vast majority of prisoners, corrections officials are the only decision makers with time-served discretion after judicial sentences become final. Even "extraordinary medical releases" fall within the sole jurisdiction of the department of corrections in Washington. (This sets aside other infrequently-used mechanisms of release such as executive clemency, emergency releases due to conditions of overcrowding, or pandemic releases.)

A traditional parole-release system exists only for a small fraction of all prisoners. Because we lack data on the range and distribution of minimum sentences imposed on such prisoners, it is impossible to model the degrees of indeterminacy across such sentences.

4.4. Overall assessment

We rate Washington's prison-sentencing system overall as one with a low degree of indeterminacy. In this project's alternative terminology, this is the same as saying that the system operates with a high degree of determinacy. For most prisoners (whose sentences are reflected in Figure 3), sentences that are 67 percent determinate are similar to those we have ranked as highly determinate in other jurisdiction reports.[45]

[45] *See* Minnesota Report and the 2020 amendments to Virginia's credit system for most prisoners convicted of nonviolent offenses, described in the Virginia Report. Both states also allow potential reductions of one-third of prisoners' maximum terms.

Washington prison sentences that carry potential credit reductions of only 10 percent are considered extremely determinate in our rating scale (or as having an extremely low degree of indeterminacy). If corrections statistics were to show that prisoners with sentences of this kind made up a large portion of Washington's prison population, this would muddy the waters for our overall judgment of the system's character, pushing closer to extreme determinacy.

We cannot draw conclusions about the degree of indeterminacy built into sentences imposed under Washington's Determinate Sentencing Plus law, which are indeterminate sentences subject to parole-release discretion despite the misleading name of the law. These sentences carry maximum and minimum terms at various ratios, with minimum terms calculated with reference to sentencing guidelines in many cases. We lack data on the range and distribution of minimum sentences imposed on this group of prisoners.

From 2003 to 2010, Washington experimented with a relatively generous credit system that allowed some prisoners to earn reductions of as much as 50 percent of their judicial maximum terms. The statute carried a sunset provision and expired in 2010 with no affirmative action by the legislature to renew the law.[46] We assume that, as of 2020, a substantial number of individuals subject to this law still remained in Washington's prison system.[47]

Washington is one of the few American jurisdictions to cut back its good time allowances since the close of the national prison buildup period in 2007.[48]

[46] Katherine Beckett & Heather D. Evans, About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State (ACLU of Washington, 2020) at 22-23.

[47] When generous 50-percent formula was in effect, we would have ranked the affected prison sentences as carrying a moderate degree of indeterminacy. In other words, if the 50-percent discount had survived, sentences of this configuration would shift the character of the entire system toward greater indeterminacy than our current assessment. The whole-system effect may not have been large, however. While the law was in force, prisoners given the benefit of the 50-percent formula made up only about 20 percent of Washington's annual prison releasees. *See* Elizabeth K. Drake, Robert Barnoski & Steve Aos, *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs*, Revised (Washington State Institute for Public Policy, 2009) at 1 ("Since the passage of the law, approximately 20 percent of all offenders who released from prison were eligible for this 50 percent earned release time.").

[48] Wisconsin has also done so, see Wisconsin Report (good time discounts eliminated in 2011 per the campaign promise of newly-elected Governor Scott Walker).